

**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

**In the Matter of the Petition for  
Reinstatement Of:**

**JOSE ALFREDO MARTINEZ**

**Physician's and Surgeon's  
Certificate No. G-49769**

**Petitioner**

**Case No. 27-2008-191998**

**DECISION**

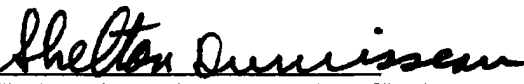
**The attached Proposed Decision is hereby adopted as the Decision and  
Order of the Medical Board of California, Department of Consumer Affairs,  
State of California.**

**This Decision shall become effective at 5:00 p.m. on August 20, 2009.**

**IT IS SO ORDERED July 21, 2009.**

**MEDICAL BOARD OF CALIFORNIA**

By:

  
Shelton Duruisseau, Ph.D., Chair  
Panel A

**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Petition for Reinstatement  
Of:

JOSE ALFREDO MARTINEZ,

Petitioner

Case No. 27-2008-191998

OAH No. 2008070411

**PROPOSED DECISION**

The hearing in the above-captioned matter occurred on May 20, 2009, at Los Angeles, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings, presided. Petitioner Jose Alfredo Martinez (Petitioner or Martinez) appeared and with his attorney, Yvette Teran. Richard J. Marino, Deputy Attorney General, appeared pursuant to Government Code section 11522.

Evidence was received, the case was argued, and the matter was submitted for decision on the hearing date.<sup>1</sup>

**FACTUAL FINDINGS**

*The Parties and Jurisdiction:*

1. Petitioner was previously licensed by the Medical Board of California (Board) as a physician, beginning in April 1983. He held Physician and Surgeon's Certificate (license) number G 49769.

2. Effective December 1, 2005, the Board accepted the surrender of Petitioner's license, pursuant to a stipulation made between Petitioner and the Executive Officer of the Board. As detailed below, by his stipulation and surrender, Petitioner admitted that he had engaged in various acts of unprofessional and dishonest conduct that subjected his license to discipline. After he surrendered his license, he was convicted of Medi-Cal fraud.

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<sup>1</sup> Petitioner's two briefs, titled "Hearing Brief for Petition for Reinstatement of Medical License" and "Supplemental Brief" were not identified on the record, but are here identified as Exhibits B and C, respectively.

3. On or about May 16, 2008, Petitioner submitted his Petition for Reinstatement to the Board, which petition was supported by various documents. The hearing in this matter ensued.<sup>2</sup> All jurisdictional requirements have been met.

*The Basis of the Underlying Discipline:*

4. In June 2004, an accusation was filed against Petitioner, alleging ten causes for discipline. Two of the claims were for gross negligence in connection with cosmetic procedures performed on two patients. The treatment of the two patients was alleged as grounds for discipline based on repeated negligent acts, and incompetence. The fifth cause for discipline alleged dishonesty and false medical records, while the sixth alleged that Petitioner's medical records for the two patients were simply inadequate, in violation of Business and Professions Code sections 2266 and 2234, subdivision (a). Petitioner was also accused of violating the rules pertaining to the use of fictitious names, false and misleading advertising, failure to produce records, and unprofessional conduct arising out of all of the other charges.

5. In his stipulation with the Board for the surrender of his license (the stipulation), Petitioner had the advice of an attorney. In entering into the stipulation, he admitted the truth of each and every charge and allegation set out in the accusation against him. He also agreed in the stipulation that if he ever sought reinstatement, then all the charges and allegations against him would be deemed true, correct, and admitted by him when the Board acted on his reinstatement petition. It was clear from the stipulation that the surrender of the license, and the acceptance by the Board of the surrender, constituted discipline against Petitioner's license.

6. The unprofessional conduct admitted by Petitioner under the stipulation is summarized as follows:

(A) In the treatment of patient Maria S., in March 2001, Petitioner was grossly negligent in injecting what purported to be collagen into wrinkles around her eyes, by failing to perform adequate tests for allergic reaction, by failing to obtain the patient's informed consent before the procedure or by failing to document same, and by failure to warn of the risk of allergic reaction or to document such a step. Further, he failed to document the lot number of the material he injected, and he failed to provide the patient, and her subsequent treating surgeon, with complete and accurate records of his treatment of Maria S.

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<sup>2</sup> The hearing could not be held until May 2009 because each side requested a continuance. The People requested a continuance of the first hearing date, which had been set by agreement of the parties, to further investigate the matter, and then, in December 2008, Petitioner requested a continuance of the December 2008 hearing date so as to review voluminous discovery.

(B) In his treatment of patient Alicia C. in December 2001, Petitioner represented that he was a specialist in plastic surgery with years of experience in dermatology, which was not the case. He injected collagen into wrinkles in her forehead. The patient developed complications. In the treatment, he failed to test or document testing for an allergic reaction to collagen, and failed to inform the patient, or failed to document that he informed the patient of potential complications from the treatment. He failed to document the lot number and other information pertaining to the manufacture of the collagen that he used.

(C) Petitioner made false statements and entries in the medical records for Maria S. and Alicia C. Records were produced which were apparently created after treatments; some typed versions of records contained, or did not contain, information contained in handwritten progress notes, or typed documents contained different information than contained in progress notes. Petitioner testified in a civil trial, and stated to the Board in an interview that typed records had been transcribed by an outside transcribing firm, but that was not true. When the Board sought records for treatment of the two patients, he submitted a Declaration of Custodian of Records, stating that he did not have records that he had previously provided the patients. He provided incomplete and inaccurate records to Maria S. and her subsequent treating surgeon. Records that he did produce to the Board were only produced after numerous demands, and after several months.

(D) In the operation of his practice, Petitioner used a fictitious name without properly obtaining a permit for that fictitious name. He advertised under that fictitious name, holding himself out as a specialist in plastic surgery. He allowed an esthetician, licensed by the Board of Barbering and Cosmetology to use his name, and designation "M.D." at her place of business; he was identified as "medical director." Further, he allowed her to post copies of his license at her place of business.

#### *Petitioner's Conviction for Medi-Cal Fraud:*

7. On March 8, 2006, Petitioner was convicted of one count of Medi-Cal fraud, based on a plea bargain.<sup>3</sup> The conviction was for a violation of section 14107, subdivision (b), of the Welfare and Institutions Code, a felony, and the conviction was entered in the Superior Court of California, County of Los Angeles. The conviction arose out of misconduct with billing to Medi-Cal that occurred in 2004 and 2005.

8. The court suspended imposition of sentence and placed Petitioner on formal probation for three years. As one of the probation terms, Petitioner was ordered to pay \$20,000 in restitution.

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<sup>3</sup> The record does not reveal whether the plea was a nolo contendere plea, or a guilty plea.

9. Petitioner's probation was terminated early, on March 13, 2008, just two years after it was imposed. Thereafter, on April 23, 2008, the court reduced his felony conviction to a misdemeanor, and then set aside his conviction pursuant to Penal Code section 1203.4.

*Petitioner's Written Case for Reinstatement:*

10. In his written petition, Martinez stated that the reason for his prior discipline was for "medical fraud." (Ex. 1, at p. 1 of the Petition for Penalty Relief.) He also stated that he had a period of probation for two years. When describing his current occupation, he stated that he had not been working, but he intended to study for and obtain a board certification in Otolaryngology in September 2008. In the portion of the petition for "recent history," Petitioner denied that he had been charged with or convicted of a crime since his license discipline. However, on a narrative statement attached to the petition, he clearly described the conviction, the probation requirements, and the fact that the charge had been reduced and set aside pursuant to Penal Code section 1203.4. Therefore, Petitioner did not attempt to mislead the Board in his response to part X of the petition when he did not reference any conviction.

11. Petitioner attached numerous documents to the petition, including a list of medical publications and journals he had reviewed, copies of continuing education certificates, court documents regarding the expungement of his conviction, and letters from two doctors, Carroll Toledo-Nader, M.D. and Robert Bonilla, M.D.

*Petitioner's Testimony and Other Evidence Presented at the Hearing:*

12. Petitioner explained some of the procedural background to the discipline case. He pointed out that his attorney had originally negotiated an agreement for a suspension and probation, but when he knew he was being investigated for Medi-Cal fraud, he informed one of the Deputies Attorney General handling the discipline case. It was then agreed that he would surrender his license. Later, he pled to one count of fraud in connection with billing to Medi-Cal.

13. Petitioner's office was closed at the time that the license discipline became effective. He sold the practice to another doctor, who took over at the beginning of 2006.

14. Petitioner testified that in the three and one-half years since he surrendered his license, he has done what he could to keep his medical knowledge current. He was not sure that he could attend CME classes—Continuing Medical Education—so he obtained books and journals and studied them. His daughter is

attending medical school in Mexico, and he worked with her, helping her study and reviewing for himself in the process. However, he has not been employed, and has not worked in or around medicine in any capacity.

15. When questioned regarding the basis of his criminal conviction, Petitioner stated that he was at fault, and responsible, and that many of the problems arose because he was careless. He did not take steps to obtain copies of cards from patients showing they were eligible, and he otherwise failed to manage the practice correctly.

16. Petitioner attested that he has interviewed other practitioners who run practices with a high volume, and he has learned from them regarding the pitfalls, in terms of management and especially billing, that a practitioner should avoid. He made it clear that he had undertaken such steps because of his conviction.

17. (A) As noted above, Petitioner provided two letters from other practitioners regarding his potential reinstatement, Doctors Bonilla and Toledo-Nader. Dr. Bonilla is one of the physicians that Petitioner consulted about practice management methods, and in his letter he states that he met with Petitioner on three occasions, at some time prior to when the letter was written, May 1, 2008.

(B) Petitioner attested that he has known Dr. Toledo-Nader for about 10 years. During the hearing, it emerged that Dr. Toledo-Nader's letter was drafted by an attorney who is an old friend of Petitioner. In that letter, it is stated that Petitioner had consulted the author about learning medical practice "mechanics."

18. Neither of the two letters clearly recommends Petitioner's reinstatement. More critical is the fact that Dr. Bonilla has been disciplined by the Board since the time that he wrote his letter, and Dr. Toledo-Nader has essentially rescinded his letter. Petitioner acknowledged during cross-examination that Dr. Toledo-Nader recently ended his friendship with Petitioner and told the latter that he would no longer stand by his letter. Petitioner did not disclose that fact to the Board prior to the hearing. He did obtain a letter from Daniel K. Cham, M.D., which was signed in September 2008. That letter speaks well of Petitioner in general terms, and concludes with the statement that Dr. Cham wishes Petitioner well in the years to come.

19. Petitioner has been living part-time in Mexico since he surrendered his license. This, he explained, was the reason he had not responded to mail sent to him by the Board after he requested reinstatement, along with the claim that his former attorney was to communicate with the Board for him.

20. Petitioner made clear he would abide by any terms and conditions that might attach to a reinstated license.

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## LEGAL CONCLUSIONS

1. Jurisdiction to determine this matter was established pursuant to Business and Professions Code section 2307, based on Factual Findings 1 through 3.

2. Petitioner bears the burden of proving that he is fit for reinstatement as a physician, and he must prove his case by clear and convincing evidence. (*Housman v. Board of Medical Examiners* (1948) 84 Cal. App.2d 308, 315 (*Housman*); *Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1091-92.) In this proceeding, he had not carried his burden, even if the burden was the lower standard of preponderance of the evidence.

3. The applicable statutes and regulations call for the Board to examine a number of issues when considering a request for reinstatement of a physician's license. The Board may consider all of the physician's activities since the discipline occurred, the nature and severity of the wrongful acts that led to license discipline, the former licensee's activities before he or she was disciplined, the petitioner's rehabilitative efforts, general reputation for truth, and professional ability. (Bus. & Prof. Code, § 2307.)

4. (A) First of all, Petitioner's misconduct was significant. It revealed flaws in professional skills, and in character, and the misconduct occurred over a period of years. Petitioner demonstrated gross negligence and incompetence in the treatment of two patients in 2000 and 2001. He had misrepresented to those two patients the extent of his skills as a cosmetic surgeon, inveigling them into treatment that he was apparently not competent to provide. When problems arose, it is reasonably inferred that he manipulated the patient records, and failed to provide accurate records to subsequent physicians and to the Board. Then, he engaged in dishonest dealing with Medi-Cal.

(B) Petitioner's actions since he lost his license have not been noteworthy. His conviction entered after he surrendered his license, but less weight is put on that fact than might be, in that the conviction arose out of acts that occurred before the surrender, and the testimony indicates that the severity of the Board's discipline tacitly took that misconduct into account. In his favor, Petitioner can show he completed his criminal probation early, made restitution, and otherwise stayed out of trouble with the law. But, otherwise, he has done little on his own to rehabilitate himself. He has not worked in the medical field or any other field, has minimum educational efforts, and can not show he has engaged in any positive community activities.

(C) There was little evidence of Petitioner's activities when his license was in good standing, aside from the malpractice and dishonesty that led to his discipline and conviction. He did attest to having treated thousands of patients during his more than 20 years in practice, and it may be inferred that he provided good care

for most of them. Other than that inference, there is little to be placed on the positive side of the ledger.

(D) Approximately eight years have passed since Petitioner's negligent treatment of the two patients. Only three years have passed since his conviction. As noted above, he can show little positive activities since that time and little evidence of rehabilitation. His letters of recommendation provide some evidence that he has tried to improve his understanding of the best way to run a practice, but those efforts are suspect given the fact that Dr. Toledo-Nadar has withdrawn his support for Petitioner, and Dr. Bonilla was recently disciplined.

(E) Petitioner was the only witness on his part. No one else appeared to support his claims, and the legitimacy of one of his letters of recommendation was obliterated. This lack of credible independent evidence hampered his ability to meet the high standard of proof imposed upon him.

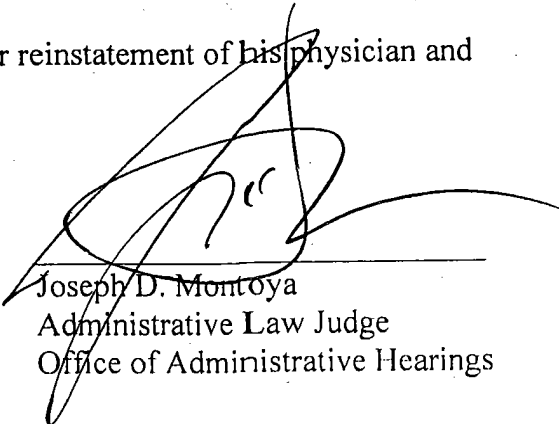
(F) The record establishes that Petitioner was found wanting in terms of his professional skills, and in terms of his honesty and integrity. He has done little to remedy his technical deficiencies. While opportunities may be limited for a physician who has lost his license, it was rightly argued that Petitioner could have done more to remain active in the medical arena, even if it meant acting as an orderly. While it can be difficult to rebuild trust in one's integrity, it appears that Petitioner could have undertaken employment or community activities where he could have taken on positions where reliability, integrity, and honesty could be revealed. To be sure, submitting letters that have been disavowed by their author, without notice to the recipient, hardly adds luster to a disciplined physician's character.

(G) As stated in *Housman, supra*: "Viewing the evidence in a light most favorable to the petitioner, it would seem that, at most, it can only be said that since his release [from prison] he has committed no further offenses and has been involved in no trouble. Rehabilitation would appear to require some positive action." (*Housman, supra*, 84 Cal.App.2d at 318.)

### ORDER

The petition of Jose Alfredo Martinez for reinstatement of his physician and surgeon's license is denied.

June 18, 2009

  
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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings